Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MARILYN LEE, PETITIONER,

v.

JOHN E. POTTER, UNITED STATES POSTMASTER GENERAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL RAY BACON
Counsel of Record

Law Offices of
Daniel Ray Bacon
234 Van Ness Avenue
San Francisco, CA 94102
(415)864-0907
BaconDR@aol.com

CURRY & TAYLOR • 202-393-4141

QUESTIONS PRESENTED

1. Has the district court abdicated its fundamental judicial function when without notice or hearing it permits the employer to write its *entire opinion* granting the employer summary judgment in this workplace discrimination case?

2. Where an employee makes a *prima facie* showing that her employer unlawfully retaliated against her for engaging in protected activity when it transferred her to a position slated for elimination, should a jury instead of a judge upon summary judgment decide whether an employer's shifting and contradictory reasons for doing so were a pretext for its unlawful conduct?

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The unpublished opinion of the United States Court of Appeals for the Ninth Circuit in *Marilyn Lee v. John E. Potter, United States Postmaster General*(C.A. No. 08-17328),decided December 16, 2009, affirming the District Court's order granting summary judgment to respondent John E. Potter, United States Postmaster General, is set forth in the Appendix hereto(App. 1-4).

The unpublished Memorandum of Decision of the United States District Court for the Northern District of California, Oakland Division, in *Marilyn Lee v. John E. Potter, United States Postmaster General*(Civil Action No. C 07-2540 SBA), decided September 30, 2008, granting summary judgment to respondent John E. Potter, United States Postmaster General, is set forth in the Appendix hereto(App. 5-33).

The unpublished Order of the United States Court of Appeals for the Ninth Circuit in *Marilyn Lee v. John E. Potter, United States Postmaster General*(C.A. No. 08-17328), issued November 9, 2009, denying oral argument, is set forth in the Appendix hereto(App. 34).

The unpublished order of the United States Court of Appeals for the Ninth Circuit in *Marilyn Lee v. John E. Potter, United States Postmaster General*(C.A. No. 08-17328), filed on February 1, 2010, denying petitioner's timely filed petition for panel rehearing, is set forth in the Appendix hereto(App. 35).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit affirming the District Court's order granting summary judgment to respondent John E. Potter, United States Postmaster General, was entered on December 16, 2009; and its order denying petitioner's timely filed petition for panel rehearing was filed on February 1, 2010(App.1;35). This petition for writ of certiorari is filed within ninety (90) days of the date the court of appeals denied petitioner's timely filed petition for panel rehearing. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED(see appendix)

STATEMENT

Petitioner Marilyn Lee ("petitioner"), an Asian-American, began her employment with respondent United States Postal Service ("respondent" or "the employer") in 1980 as a Senior Stenographer and was eventually promoted to Secretary in the office of respondent's Regional Chief Inspector for the Western Region(App. 8). In 1992, she was assigned to the San Francisco Division of respondent's Postal Inspection Service as secretary to the Division's Inspector in Charge ("INC") (*Id.*). Petitioner remained in this position for the next eleven years(*Id.*).

In February of 2003, a petition was distributed among the employees of respondent's Postal Inspection Service expressing dissatisfaction with the general

management style of INC Alan Kiel and his two Assistant Inspectors(App. 8-9). The petition protested the fact that management was showing bias, favoritism and discrimination in promoting employees(App. 8).Requesting an independent investigation into the Division's working conditions, it promised confidentiality for those employees who signed the petition(App. 9).

Petitioner and 48 other employees signed the petition(*Id.*). In its aftermath, management undertook significant changes, reassigning both Assistant Inspectors, replacing them with personnel from outside the Division(*Id.*). INC Kiel retired on June 30, 2003, and an interim INC worked in this capacity from March of 2003 until July 1, 2003(*Id.*).

Although the employees who signed the petition were promised confidentiality, someone leaked petitioner's name as one of the signatories and management in the summer of 2003 repeatedly approached petitioner about her reasons for signing the petition(App. 9-10). She met with management and EEO counselors in approximately June of 2003 and complained about promotions which she understood to be racially motivated and infected by favoritism(App. 10). She named the same managers which two of her co-workers had also identified as carrying out this racially biased practice. During this meeting, management promised petitioner orally and in writing that she would not be removed, transferred or demoted from her position.

By September of 2003,William Atkins ("Atkins") permanently replaced INC Kiel as the Division's INC

and petitioner continued as INC secretary(App. 9). However, within four months of INC Atkins' arrival at the Division, he moved petitioner's desk and work station----which had been located just outside the San Francisco manager's office for the last eleven years---- to a secluded office where she was separate from her supervisor and not privy to discussions by the new managers of the Division.

In early 2004, INC Atkins began soliciting petitioner to take a supervisory position on a temporary basis. Petitioner was a level 14 employee and this supervisory position was an "equal level" or lateral position as Administrative Support Center supervisor, overseeing the Center's staff of clerical employees(App. 10). Petitioner did not want this temporary supervisory position but after repeated requests by Atkins, petitioner agreed to the transfer in June of 2004, believing management's promise that this job detail would last only until December of 2004 and that she would return to her permanent INC secretary position.

However, management had determined as early as July 25, 2003, to eliminate entirely the Administrative Support Center and lay off all of its employees. Respondent's management therefore assigned petitioner to a position which it already had slated for elimination from the Division's workforce.

Petitioner found her new job responsibilities stressful and repeatedly asked management for reassignment back to her permanent position as INC secretary(App. 10). Management refused each of petitioner's requests, citing *inter alia* her good

supervisory performance; her "indispensable" role as a supervisor; the fact that her secretarial duties for INC Atkins were more easily absorbed by other employees; that her replacement as INC secretary had performed as well, if not better, than petitioner; and that there was no viable replacement for her on the Administrative Center's staff(App. 10-12). Despite this, petitioner was never offered her supervisor's position at the Administrative Center when that supervisor was assigned elsewhere.

In addition, according to INC Atkins, there were no bid positions among the Inspection Service's clerical staff and thus petitioner's previous assignment as his secretary was not a bid position to which she was entitled to return(App. 12-13). As he later testified, the clerical support positions within the Division's Inspection Services are filled by non-bargaining unit employees and reassignments are routine because these non-bargaining employees are always subject to periodic reassignments without following regular competitive procedures(*Id.*).

Thus in the wake of petitioner's signing a petition that management had shown favoritism and bias in promoting employees and her subsequent statements to management that she believed some of its decisions to promote were racially motivated and showed favoritism, respondent management moved her work station as INC Atkins' secretary from outside the manager's office to a secluded office, convinced her to take a temporary supervisory position in the Administrative Center, a position already slated for elimination by management, and then forced her to remain in this "temporary" position in violation of

agency regulations (USPS Employment Labor Mgmt. Reg.-- Assignment, Reassignment and Promotion) designed to protect employees from being marooned indefinitely in temporary details and despite her pleas for reassignment back to her permanent position as secretary for INC Atkins.

On July 13, 2005, petitioner spoke with Acting Assistant INC Sally Diaz and expressed her unhappiness with this continuing temporary assignment in the Administrative Center as well as management's decision not to allow her to return to her permanent secretarial duties(App. 13). After being told that she would *never* be returned to her permanent position as INC secretary, petitioner in frustration commented to Diaz: "What do I have to do, do I have to hurt myself to make it clear that I have to be removed from the supervisory position?"(*Id.*).

Diaz informed INC Atkins of petitioner's comment the following day(*Id.*). On July 18, 2005, respondent's management removed her from her job, cut off her computer access and placed petitioner on paid administrative leave "while the Inspection Services reviews the circumstances surrounding your alleged stressful work environment"(App. 13-14).

Respondent claimed to be concerned about petitioner's "suicidal threat"(*Id.*). However, even though there was a resident physician at the general mail facility just ten minutes away from petitioner's work area, respondent did not refer petitioner to any employee assistance program on the day it discharged her; nor did it send petitioner to any of the available physicians who could have seen her immediately for

evaluation. Instead, management scheduled petitioner for a fitness-for-duty examination to be conducted on September 8, 2005(App. 14).

The examining physician diagnosed petitioner as exhibiting Adjustment Disorder with Depression; he reported that petitioner was almost ready to return to her secretarial duties at work but he restricted her from supervising others; and he recommended that she not report to a particular supervisor whom petitioner believed had treated her unfairly(App. 14). In October of 2005, petitioner requested to return to work and be reassigned out of her supervisory duties(*Id.*). She wanted a detail which was a non-permanent assignment to the Office of Inspector General (OIG); however, the detail was cancelled when the OIG was unwilling to assume petitioner's salary during this detail(*Id.*). However, petitioner was able to prove that the Inspection Service Division paid for details for other Inspection Service employees but refused to pay for her OIG detail.

In the meantime, on August 10, 2005, petitioner filed a workers' compensation claim for "work related stress & hostile work environment," a claim which the Department of Labor eventually approved on February 4, 2006(*Id.*). As a result, petitioner was placed on temporary total disability and still remains in that status(App. 14-15).

Petitioner also filed a formal EEO complaint on September 30, 2005, alleging that she was discriminated against on the basis of race (Asian), sex (female), disability (stress) and in retaliation for her prior protected EEO activity when: (1) in February of 2003,

she signed a petition which resulted in the removal of three managers; (2) in June of 2003, when she participated in a meeting with management investigating the petition; (3) in June of 2005, when her repeated requests to be returned to her position of record as INC secretary were denied; and (4) in July of 2005, when she was informed by management that she was scheduled for a fitness-for-duty examination.

These allegations charging respondent with discriminating against petitioner in her employment and unlawfully retaliating against her because she had signed a petition opposing management's bias and favoritism in promoting employees, describe serial violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a) and (b) and 3, as well as § 501 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791 *et seq.*(App. 6;16-17).

At the conclusion of the EEOC's investigation of her complaint, petitioner requested a hearing before the Regional EEOC Administrative Judge. On May 3, 2006, over petitioner's objections and without a hearing, the Administrative Judge *sua sponte* denied petitioner's request concluding that her complaint did not warrant a hearing. On May 17, 2006, the Regional EEOC Administrative Judge issued a final order concluding that petitioner had not proven that she had been subject to conduct in violation Title VII even though petitioner was never given a hearing in which to prove her allegations.

On June 19, 2006, petitioner filed an appeal from the Administrative Judge's ruling with the EEOC, Office of Federal Operations, in Washington, D.C. On

March 16, 2007, the EEOC affirmed the Regional EEOC Administrative Judge's final order to dismiss petitioner's complaint without a hearing. Addressing only petitioner's claims it considered timely brought, i.e., retaliatory disparate treatment and respondent's scheduling of petitioner for a fitness-for-duty exam, it determined that petitioner's allegations had not raised a genuine issue of material fact which would warrant a hearing on either score.

It ruled that respondent had articulated legitimate, nondiscriminatory reasons for refusing to allow petitioner to return to her permanent position as INC secretary and that petitioner had not shown that, more likely than not, respondent's articulated reasons for its actions were a pretext to mask unlawful discriminatory animus. Other than petitioner's own assertions, the EEOC saw no evidence that unlawful employment discrimination or retaliation had taken place. As for the fitness-for-duty exam, it found that respondent's action grew out of a genuine concern about petitioner's state of mind and made the exam job-related and consistent with business necessity, thus within the limitations set out by the Reclamation Act, 29 U.S.C. §§ 791 *et seq.*

On May 14, 2007, petitioner appealed this ruling to the federal district court for Northern District of California, Oakland Division, for a *de novo* trial on the issues raised by her EEOC complaint. Besides alleging unlawful employment discrimination and retaliation by respondent, petitioner claimed respondent committed fraud, negligent misrepresentation, negligent infliction of emotional distress, breach of contract and breach of the covenant of good faith and fair dealing.

On July 15, 2008, after discovery between the parties, respondent moved for summary judgment(App. 5-6). The district judge refused to permit any oral argument on respondent's motion *and without notice to petitioner permitted the attorney for respondent, the employer in this workplace discrimination suit, to write the entire memorandum of decision granting respondent's own motion for summary judgment*(App. 5-33).

The unpublished memorandum of decision, prepared by the attorney for the employer and then signed by the district judge as her own, contained crucial misstatements of fact, irretrievably distorting the Rule 56 materials so that the relevant evidence characterized in the decision as "undisputed facts"was irremediably slanted or "cherry picked" in favor of respondent, the moving party, and against petitioner, the opposing party, all in contravention of the fundamental precepts of Rule 56 practice, as enunciated by this Court(*Id.*).

The decision as written by the employer and signed by the district judge mischaracterizes completely the parties' competing documentary presentation in order to sanitize the employer's conduct to eliminate all triable fact issue for a jury as to whether petitioner had engaged in protected activity under Title VII, whether she suffered an adverse employment action stemming from this protected activity and whether respondent's reasons for denying petitioner's requests for reassignment were legitimate, non-retaliatory and not a pretext for unlawful discrimination(App.8-32).

For example, the decision splits rhetorical hairs to conclude that petitioner's signing of a petition protesting respondent's *bias* and *favoritism* in making promotions is not a protected activity under Title VII because the petition does not identify this conduct as *discriminatory* employment practices, even suggesting, contrary to her own opposing materials and affidavit, that petitioner herself did not believe that she was protesting *discriminatory* employment practices(App. 19-21). The substance of petitioner's interview with management and EEO counselors in June of 2003 wherein she specifically discussed decisions by management which she claimed to be *racially motivated* and infected by favoritism are *not even addressed* in the decision(App. 21).

The decision, ghostwritten by the employer, nullifies as an adverse employment action management's decision just four months after INC Atkins' arrival to move petitioner's work station to a secluded office, pushing her into a supervisory position for which she was ill equipped and then denying her reassignment back to her permanent position as INC secretary, contrary to its promise to do so(App.). It ignores evidence of her unsuitability for this "lateral transfer," the dramatically negative psychological impact it had upon petitioner and adopts respondent's false boosting of her performance in order to keep her marooned in a position which she did not want, *the only employee to be treated this way*(App. 21-24). It also ignores petitioner's evidence that management's repeated refusal to reassign her from this temporary assignment and its insubordination threats created a hostile work environment and caused petitioner severe

emotional distress, adversely affecting her employment within the meaning of Title VII.

Finally, this one-sided decision adopts wholesale as legitimate respondent's shifting, contradictory reasons for keeping petitioner in this indefinite, temporary assignment against her wishes and contrary to its promise not to do so(App. 27-32). Petitioner's own proof on summary judgment, *never* referenced by the decision, proved these reasons were false and a pretext: the position to which petitioner was assigned was one already slated by respondent to be eliminated; it was made in the wake of her signing the petition and meeting with management to complain about management's discriminatory practices in promoting; and she was placed in this position so that management could eventually lay her off. Moreover, respondent's own regulations regarding temporary assignments undermined its claim that it could keep petitioner in such a temporary assignment indefinitely.

None of this crucial proof by petitioner on summary judgment found expression in the decision prepared by respondent. Instead, the employer's one-sided memorandum of decision skews the "undisputed facts" irremediably and adopts without reservation its own contradictory reasons for keeping petitioner in an indefinite, temporary assignment as legitimate, nondiscriminatory and lacking any pretext of retaliation or other discriminatory animus(*Id.*). Summary judgment therefore entered in respondent's favor(App. 5-6;32-33).

Petitioner appealed, arguing, among other things, that the employer's memorandum of decision

granting itself summary judgment----adopted by the district court as its own---failed to reflect *or even reference* petitioner's proof adduced below that she had engaged in protected activity within the meaning of Title VII and that in retaliation therefor, respondent assigned her to an position already slated for elimination by management, refusing to return her to her permanent position as INC secretary, as it had promised to do.

Without oral argument, the court of appeals affirmed the district court decision in an unpublished *per curiam* opinion(App. 1-4;34). Adopting entirely the district court's memorandum decision written by the employer, it ruled that petitioner had failed to establish a *prima facie* case of retaliation "because she was not subjected to an adverse employment action" as the move to supervisor for the Administrative Center was lateral and there was no termination, demotion, bad performance review or refusal to promote(App. 2-3).

Nor did the court of appeals conclude that petitioner had made out a causal connection between her signing the petition and management's decision to transfer her to a supervisory position, overlooking petitioner's proof that respondent decided four months after INC Atkins' arrival to move her work station from outside the manager's office to a secluded office and then shortly thereafter convinced her to take this supervisory position which it already had slated for elimination (App. 3). The court of appeals also believed as legitimate and non-discriminatory respondent's false, contrived and contradictory reasons for transferring petitioner and then refusing to reassign her back to her permanent position as INC secretary(App. 3-4).

Finally, the court concluded that the district court did not abuse its discretion in ruling on this summary judgment motion without hearing oral argument(App. 4).

On February 1, 2010, the court of appeals denied petitioner's timely filed petition for panel rehearing(App. 35).

REASONS FOR GRANTING THE PETITION

1. Petitioner Was Denied Due Process And Rule 56's Decisionmaking Protocol Was Irremediably Subverted When The District Judge Without Notice Permitted The Employer In This Workplace Discrimination Suit To Prepare The Memorandum Of Decision Granting It Summary Judgment And Then Without A Hearing Adopted Verbatim The One-Sided Memorandum As Her Own.

At the heart of the disposition of a motion for summary judgment under Fed. R. Civ. P. 56(c) is the district court's robust assessment of the competing documentary presentations of the parties in order to determine whether there exist triable fact issues which a jury should decide. Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where "it is quite clear what the truth is, that no genuine issue remains for trial, [because] the purpose of the rule is not to cut litigants off from their right of trial by jury, if they really have issues to try." *Poller v. Columbia Broadcasting*, 368 U.S. 464, 467(1962) quoting *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627(1944).

Since one of the fundamental duties of the jury in civil cases is to resolve factual disputes bearing on material issues in controversy, the summary judgment procedure of Rule 56 does not violate a party's constitutional right to a jury trial. It is presumed that if the entry of summary judgment is otherwise appropriate, there are *no* genuine issues of material fact for trial and therefore no right to a jury trial is implicated. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902). See also *Pease v. Rathbone-Jones Eng. Co.*, 243 U.S. 273, 278-279(1917).

However, the process attending summary judgment has been irremediably subverted and the non-movant plaintiff's right to a jury trial has been violated when a district judge abdicates entirely her decisionmaking function by assigning to the employer, the party moving for summary judgment in this workplace discrimination case, the right to prepare not only the "undisputed facts" but also the conclusions of law flowing from these facts, i.e., *the entire opinion* granting the employer's own summary judgment motion.

This Court has criticized the complete verbatim adoption of the findings of fact prepared by the prevailing party. *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 572(1985). See *United States v. El Paso Gas Co.*, 376 U.S. 651, 656-657(1964). But it has considered those findings of fact to be those of the trial court after a full bench trial where the lower court did not appear "to have uncritically accepted" those findings. *Id.* Here, however, we are not dealing with just findings of fact submitted by the prevailing party and adopted by the lower court after some kind of critical analysis. Instead,

the Court is confronted here with a District Court *opinion* that is an identical, verbatim copy of the employer's proposed opinion.

This fact alone distinguishes this case from *Anderson*. While there is authority for the submission of proposed findings of fact and conclusions of law to the court by the attorneys for the opposing parties,

> there is no authority in the federal courts that countenances the preparation of the opinion by the attorney for either side. *That practice involves the failure of the trial judge to perform his judicial function.*

Bright v. Westmoreland County, 380 F.2d 729, 732(3rd Cir. 2004) quoting *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724-725(4th Cir. 1961)(emphasis in original).

Judicial opinions are the core work product of judges. They represent a critical assessment of the parties' competing contentions and their documentary presentations under Rule 56. An opinion ghostwritten by one of the party's attorneys and signed by the district judge is not a logical and analytical explanation of why summary judgment should enter for the employer. It lacks the badge of independent judicial thought and is evidence that the district court failed to perform her most fundamental judicial function.

Moreover, when it occurs without notice to the opposing party and without any hearing, it amounts to a denial of due process. *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d at 725. The prejudice is acute when it is

accomplished incident to a summary judgment motion. This unfair process fostered a one-sided, unprincipled treatment of the parties' summary judgment materials, deciding credibility questions for the employer in order to reject every genuine issue of material fact adduced by petitioner thereby denying her any hearing on the merits of her claims of workplace discrimination. There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of her case. *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 209(1958).

Petitioner in this litigation has never been afforded a fair hearing on her claims and the district judge's wholesale adoption of the employer's opinion as her own compounds the prejudice of this unfair procedure. This abuse of Rule 56 procedure justifiably invokes this Court's power of superintendency over the federal courts to reassert the district court's fundamental judicial function in deciding summary judgment motions in employment discrimination cases.

2. In Reliance Upon A One-Sided Memorandum Of Decision Prepared By The Employer, Both The District Court and The Court of Appeals Misapplied the *McDonnell Douglas* Framework of Proof, Determining Fact Issues Of Protected Activity, Adverse Employment Action, Causality And Pretext, Denying Petitioner A Jury Trial On Her Proof That Respondent Unlawfully Discriminated Against Her When In Retaliation For Her Protected Activity, It Assigned Her To A Position Slated For Elimination.

McDonnell Douglas Corp. v. Green, 411 U.S. 792(1973) "established an allocation of the burden of production and an order for the presentation of proof in...discriminatory treatment cases" in the absence of direct proof of discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142(2000) quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506(1993). First, the petitioner must establish a *prima facie* case of discrimination. *Id. Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253(1981). The term "*prima facie* case" means the establishment of a legally mandatory, rebuttable presumption, *Burdine*, 450 U.S. at 254 n.7, one which "raises an inference of discrimination only because we presume [that] these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577(1978)

If petitioner proves unlawful discrimination, harassment or retaliation by a preponderance of the evidence, she has established her *prima facie* case which creates the presumption that the employer has unlawfully discriminated, proof which, if believed by a trier of fact and if the employer is silent in the face of this presumption, would warrant a judgment for petitioner because no issue of fact remains in the case. *Burdine*, 450 U.S. at 254. Under *McDonnell Douglas*, the employer is then given the opportunity to rebut petitioner's *prima facie* case by adducing evidence that the adverse employment action was accomplished for a legitimate, nondiscriminatory purpose. *Reeves, supra. Burdine, supra. McDonnell Douglas*, 411 U.S. at 802.

If the employer successfully carries its burden, the presumption of discrimination---but *not* petitioner's evidence in support of this presumption—disappears; the sole remaining issue becomes discrimination *vel non* and petitioner must prove by a preponderance of the evidence that the reasons offered by the employer were not its true reasons but were a pretext for discrimination. *Reeves*, 530 U.S. at 143 citing *Hicks*, 509 U.S. at 507-508. Helped by the same proof which established her *prima facie* case, petitioner may establish that she was the victim of intentional discrimination by showing that a discriminatory reason more likely motivated the employer, *Burdine*, 450 U.S. at 256, or that its presumptively valid reasons for disparate treatment "were in fact a coverup for a ... discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805. See *Hicks*, 509 U.S. at 510.

Under the *McDonnell Douglas* framework, petitioner's initial burden of establishing a *prima facie* case of disparate treatment or retaliation for protected activity is "not onerous." *Patterson v. McLean Credit Union*, 491 U.S. 164, 186(1989). *Burdine*, 450 U.S. at 253. It focuses on (1) whether petitioner engaged in protected activity; (2) whether the employer subjected her to an adverse employment action; and (3) whether there is a causal link between the protected activity and the adverse employment action. *Patterson*, 491 U.S. at 186-187. *Burdine*, 450 U.S. at 253. *McDonnell Douglas, supra*. See *Ray v. Henderson*, 217 F.3d 1234, 1240(9th Cir. 2000).

Petitioner made this *prima facie* showing. Her summary judgment materials, never referenced below, demonstrates that she is an Asian-American female

employee who signed a petition in February of 2003 protesting "management decisions based on personal agendas and biases rather than the best interests of the Division and its employees."As petitioner explained in her summary judgment opposition, "I signed the petition because management was showing favoritism and *discrimination* in promoting employees." Petitioner also made contact with management and EEO counselors in June of 2003 where she complained about management's *racially* discriminatory practice of promoting employees.

Petitioner's activities are at the core of protected activity under Title VII which expressly prohibits employers from discriminating against an employee because she "opposed any practice made an unlawful employment practice by this subchapter...."42 U.S.C. § 2000e-3(a). An employer's promotion practice which is racially motivated, discriminatory and contaminated by bias or favoritism is on its face an unlawful employment practice within the purview of Title VII. Making an informal complaint about such practices to a supervisor is a protected activity. *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1514(9th Cir. 1989).

Even an employee's complaints about the treatment of *other* employees in this regard is considered protected activity, even if the complaining employee is not a member of the class that she claims suffers from discrimination and even if the discrimination complained about was not legally cognizable. *Moyo v. Gomez*, 40 F.3d 982, 985(9th Cir. 1994). *A fortiori*, petitioner's informal meeting with management and EEO counselors in June of 2003 to complain about respondent's discriminatory promotion

practices is protected activity under Title VII. *Ray v. Henderson, supra.*

Yet the district court decision, written entirely by the employer and ratified by the district judge, splits rhetorical hairs to conclude that petitioner's signing of a petition protesting respondent's *bias* and *favoritism* in making promotions is not a protected activity under Title VII because the petition did not identify this conduct as *discriminatory*, even suggesting, contrary to her own opposing materials, that petitioner herself did not believe that she was protesting *discriminatory* employment practices. The substance of petitioner's interview with management and EEO counselors wherein she specifically complained about decisions by management which were *racially motivated* and infected by favoritism are not even addressed in the memorandum of decision.

As for proof of an adverse employment action, petitioner's materials showed that within four months of INC Atkins' arrival at the Division in September of 2003, and first becoming aware of petitioner's protected activity, he moved petitioner's work station to a secluded office where she was separate from her supervisor and not privy to any discussions by the new managers of the Division. He then persuaded petitioner to make a lateral transfer to a supervisory position at the Administrative Support Center; and petitioner finally acceded , believing management's promise that this job detail would last only until December of 2004 and that she would return to her permanent INC secretary position.

However, management had already decided as early as July 25, 2003, to eliminate entirely the Administrative Center and lay off all of its employees. Respondent's management therefore had assigned petitioner to a position which it already had slated for elimination from the Division's workforce. Compounding this adverse employment action, respondent, contrary to its promise to do so and contrary to its own agency regulations, then refused each of petitioner's serial requests for reassignment back to her permanent position as INC secretary.

This is a *prima facie* showing of an adverse employment action. Even lateral transfers and assignments are adverse employment actions; and disadvantageous transfers or assignments where the employee is marooned indefinitely in a temporary job detail which is slated by management for elimination is especially adverse. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57(2006). *Accord*, *Ray v. Henderson*, 217 F.3d at 1241; *Wyatt v. City of Boston*, 35 F.3d 13, 15-16(1st Cir. 1994); *Yartzoff v. Thomas*, 809 F.2d 1371, 1379(9th Cir. 1987); *St. John v. Employment Development Dept.*, 642 F.2d 273, 274(9th Cir.1981). Moreover, moving an employee's work station from a spacious, brightly lit office to a secluded office unconnected with an employee's supervisor, depriving the employee of social and work-related support services and interaction with her supervisors and co-employees, is an adverse employment action. *Knox v. Indiana*, 93 F.3d 1327, 1334(7th Cir. 1996).

Yet the district court's decision prepared by the employer's attorney sanitizes as harmless---even beneficial to petitioner----management's decision, just

four months after INC Atkins' arrival, to move petitioner's work station to a secluded office, pushing her into a supervisory position for which she was ill equipped and then denying her reassignment back to her permanent position as INC secretary, contrary to its promise to do so.. It ignores evidence of her unsuitability for this "lateral transfer," the dramatically negative psychological impact it had upon petitioner and adopts respondent's contrived boosting of her performance in order to keep her marooned in a position she did not want. It also overlooks petitioner's evidence that management's repeated refusal to reassign her from this temporary assignment and its threats of discipline for insubordination created a hostile work environment and caused petitioner severe emotional distress, adversely affecting her employment within the meaning of Title VII.

As for causality, petitioner's materials showed that *within four months* of INC Atkins' arrival at the Division in September of 2003 and his first learning of petitioner's protected activity, he initiated the adverse employment action by moving petitioner's desk and work station to a secluded office where she was separate from her supervisor; and he then began to solicit petitioner to take a temporary assignment in the Administrative Support Center, a position management already had slated for elimination. This was a sufficient showing of causality to support petitioner's *prima facie* showing of workplace discrimination.

Neither this Court's decision in *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273 (2001), nor any Ninth Circuit precedent holds that a temporal nexus of four months between protected activity and

management's adverse employment action is insufficient to make a *prima facie* showing of causality. The *Breeden* Court *never* adopted such a time line, only observing that some courts of appeals require the nexus to be "very close." *Id.* Nor does any decision addressing this issue accommodate the unique circumstances of this case where petitioner's incoming supervisor (Atkins) was not made permanent until September of 2003 and within four months of becoming aware of petitioner's protected conduct began the adverse employment action by moving her work station and then persuading petitioner to take a temporary detail in a position it had slated for elimination just *one month* after petitioner had met with management and EEO counselors in June of 2003 to complain about respondent's discriminatory promotion practices. This "delayed reaction" by management to petitioner's protected activity, caused in part by the arrival of a new INC, cannot evade Title VII's remedies and no decision by this Court has held otherwise.

Yet the district court's decision prepared by the employer irresponsibly cites this Court's decision in *Breeden* for demanding at least a three-month or sooner nexus between protected activity and the adverse employment action; and it claims that the time between these events was not four but *eighteen* months, ignoring petitioner's proof to the contrary(App. 24-25). Moreover, adopting every one of management's claims as credible, it finds that INC Atkins really didn't know about petitioner's protected activity, had no motive to retaliate against her and was really helping petitioner by making her take the temporary assignment(App. 25-27).

The final inquiry under *McDonnell Douglas* is whether petitioner proved by a preponderance of the evidence that the reasons offered by the employer were not its true reasons for discharge but rather were a pretext for discrimination because of her protected activity. On this score, the summary judgment materials showed that to justify its decision preventing petitioner from returning to her permanent job as INC secretary, management cited *inter alia* her good supervisory performance; her "indispensable" role as a supervisor; the fact that her secretarial duties for INC Atkins were more easily absorbed by other employees; that her replacement as INC secretary had performed as well, if not better, than petitioner; and that there was no replacement for petitioner as supervisor of the Administrative Center even though all of the Center's jobs were slated for elimination.

Atkins also claimed that there were no bid positions among the Inspection Service's clerical staff and thus petitioner's previous assignment as his secretary was not a bid position to which she was entitled to return, *despite agency regulations to the contrary*. Atkins also claimed that the clerical support positions within the Division are filled by non-bargaining unit employees and reassignments were purely discretionary because non-bargaining employees are always subject to periodic reassignments as necessitated by the needs of the Division without following regular competitive procedures.

But if petitioner was so "indispensable," why was she detailed to a position slated for elimination and then encouraged to take other details which would have removed her from this position? If agency regulations

were in place designed to protect employees from being marooned indefinitely in temporary details, why did Atkins assert an unbounded discretion to deny petitioner's return as INC secretary indefinitely despite her pleas for reassignment back to her permanent position? If there were no replacement for her as supervisor, how could petitioner name at least four other employees who could have filled that position, two of whom became supervisors themselves? If she were performing her supervisory job well, why was petitioner undergoing extreme stress of which management was aware? If petitioner's detail was temporary, why did Atkins fill her permanent INC secretary job and claim the employee was performing better than petitioner?

These inconsistent—indeed, irreconcilable--- explanations put forth by respondent during this litigation for refusing to assign petitioner back to her permanent position cannot be harmonized on this summary judgment record despite the district court's memorandum of decision----written by the employer---- to the contrary . Instead, these contradictory reasons given by the employer are so starkly incompatible--- in fact, they permit the inference that *respondent was lying* to the court---that they create a genuine issue of material fact for a jury whether in giving these conflicting reasons for refusing reassignment for petitioner, respondent was mounting a pretext or coverup for its unlawful, discriminatory misconduct. Petitioner therefore deserved a jury trial under the *McDonnell Douglas*' protocol of proof and both the federal courts below were wrong to conclude otherwise.

In addition to petitioner's *prima facie* proof, respondent's contradictory justifications for refusing petitioner reassignment were themselves a reason to infer that its articulated reasons were a pretext or a coverup for invidious discrimination. *Reeves*, 530 U.S. at 147-149(a *prima facie* case by the employee together with sufficient evidence to reject the employer's explanation permits a finding of liability by the factfinder). The federal courts of appeal uniformly follow *Reeves* and hold that an employer's shifting, incompatible reasons for treating an employee adversely is *itself* justification for denying summary judgment to the employer in a workplace discrimination case and permitting the issue of pretext to go to the jury. As the court of appeals for the First Circuit explained,

> [a] company may have several legitimate reasons to dismiss an employee.But when a company, at different times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are pretextual [for purposes of the *McDonnell Douglas* framework].

Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 432(1st Cir. 2000). *Accord*, *E.E.O.C. v. Ethan Allen, Inc.* , 44 F.3d 116, 120(2nd Cir. 1994); *E.E.O.C. v. Sears, Roebuck and Co.* 243 F.3d 846, 853(4th Cir.1993); *Thurman v. Yellow Freight Sys.., Inc.*, 90 F.3d 1160, 1167(6th Cir.1996); *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1422(7th Cir.1992); *Kobrin v. University of Minnesota*, 34 F.3d 698, 703(8th Cir. 1994); *Washington v. Garrett*, 10 F. 3d 1421,1434(9th Cir. 1993); *Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808, 813(10th Cir. 2000).

Indeed, the *Hicks* Court teaches that the fact issue of discrimination should be treated no differently than any other ultimate question of fact, that whether an employer's "obviously contrived" reason for an employee's discharge or reassignment adds up to discrimination "remains a question for the factfinder to answer" and that

> [t]he factfinders' disbelief of the reasons put forward by the [employer for discharging/reassigning the employee] (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the [employer's] proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

509 U.S. at 510-511;524(emphasis in original). *Reeves*, 530 U.S. at 147.

Finally, as *Reeves* makes clear, the district court and the court of appeals in reviewing the materials before it were required to draw all inferences in favor of petitioner, the nonmoving party, and it could not make any credibility determinations because this is a function of a jury, not a judge. 530 U.S. at 150-151 citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255(1986). Contrary to this law, the district court's memorandum of decision and the court of appeals in its decision wrongly believed and then adopted respondent's contrived, incompatible reasons for marooning petitioner in an indefinite, temporary position slated for elimination.

Thus by abdicating to the employer its fundamental judicial function to write her own decision, the district judge permitted her unauthorized belief in respondent's story about its reasons for refusing to reassign petitioner back to her permanent position to infect her assessment of the petitioner's evidence of retaliatory treatment, nullifying petitioner's rights under the *McDonnell Douglas* framework and denying her a jury trial through summary judgment. The court of appeals' ratification of this unfair process denied petitioner the same rights.

This abuse of summary judgment in Title VII cases has been documented. One scholar concludes that courts routinely weigh evidence, draw inferences in favor of the moving party (typically the employer) and make credibility determinations. McGinley, Ann C., *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 229(1993). Likewise, it was found that courts often reject the plaintiffs' attempts to create inferences of intent and motive through a totality of circumstantial evidence by treating the evidence in a piecemeal fashion, isolating and rejecting as insufficient each of the discrete elements of the plaintiffs' evidence rather than considering their cumulative effect. *Id.* at 233-236.

Such is the case here. Instead of denying respondent's motion for summary judgment because of the conflicting—indeed, irreconcilable—reasons it proffered for refusing reassignment to petitioner, the district court through a one-sided memorandum of decision prepared by the employer and the court of appeals in a *per curiam* affirmance improperly drew

every inference from the parties' proof *against petitioner*, accepting the employer's contrived explanation for its conduct as true. Petitioner deserved a jury trial on these crucial fact questions central to her claim and denying her this opportunity is a misapplication of the *McDonnell Douglas* framework, an abuse of Rule 56 procedure and an unconstitutional denial of petitioner's right to a jury trial on contested fact issues.

CONCLUSION

For all the reasons stated herein, a writ of certiorari should issue to review and vacate the judgment of the court of appeals, remand the matter to the district court for further discovery and a trial on the merits of petitioner's claims; or provide petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

Daniel Ray Bacon
Counsel of Record
Law Offices of Daniel Ray Bacon
234 Van Ness Avenue
San Francisco, CA 94102-4515
(415)864-0907
E-mail: BaconDR@aol.com

(any footnotes trail end of each document)

No. 08-17328

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARILYN LEE,
Plaintiff - Appellant,
v.
JOHN E. POTTER, United States Postmaster General,
Defendant - Appellee.

December 8, 2009 **, Submitted, San Francisco, California**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

December 16, 2009, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeal from the United States District Court for the Northern District of California. D.C. No. CV 07-0254-SBA. Saundra B. Armstrong, District Judge, Presiding.

COUNSEL: For MARILYN LEE, Plaintiff - Appellant: Daniel Ray Bacon, Law Offices of Daniel Ray Bacon, San Francisco, CA.

For JOHN E. POTTER, United States Postmaster General, United States Postal Service, (Capitol Metro Area) Agency, United States of America, Defendant -

Appellee: James A. Scharf, Assistant U.S. Attorney, OFFICE OF THE U.S. ATTORNEY, San Jose, CA.

JUDGES: Before: TASHIMA, GRABER, and BYBEE, Circuit Judges.

OPINION

MEMORANDUM *

Plaintiff Marilyn Lee appeals the summary judgment entered in favor of Defendant United States Postmaster General John E. Potter. On de novo review, *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 896 (9th Cir. 2008), we affirm.

1. In a diversity case involving claims of employment discrimination under state law, we apply the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1093-94 (9th Cir. 2001).

(a) Plaintiff failed to establish a prima facie case of retaliation because she was not subjected to an adverse employment action. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006). The denial of Plaintiff's request for reassignment did not constitute an adverse employment action. The move to supervisor was lateral; there was no termination, demotion, bad performance review, or refusal to promote. In fact, the supervisory duties to which Plaintiff was assigned were objectively more desirable than the duties she had held as a secretary. She received a cash award for her

performance and received other leadership opportunities while working as a supervisor.

(b) Further, Plaintiff failed to make out a prima facie case because the record does not establish a causal connection between her signing a petition and management's decision to keep her as a supervisor. *See Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). The two events occurred too far apart to allow an inference that they were related. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (per curiam) (holding that temporal proximity between protected activity and adverse employment action must be "very close" to make a prima facie case of retaliation). Nearly eighteen months elapsed between Plaintiff's signing a petition protesting certain management policies and the denial of her first request for reassignment. That length of time is not "very close" and, therefore, does not demonstrate causation. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (holding that an "18-month lapse between [a] protected activity and an adverse employment action is simply too long . . . to give rise to an inference of causation"). Moreover, the Inspector in Charge who denied Plaintiff's requests for reassignment had no retaliatory motive.

(c) Even if Plaintiff established a prima facie case, the record does not refute Defendant's legitimate and non-discriminatory reasons for refusing to grant her request for reassignment. *See McDonnell Douglas Corp.*, 411 U.S. at 802 (discussing pretext). Plaintiff was performing well in the supervisory role. Management kept her in that role because of her superior performance and excellent management skills. If she

were removed, it would have been hard to find a suitable replacement. Moreover, her old job had been filled.

2. The district court did not abuse its discretion in ruling on the motion for summary judgment without holding oral argument. A district court is not required to hold a hearing before granting summary judgment. *See Mahon v. Credit Bureau of Placer County Inc.*, 171 F.3d 1197, 1200 (9th Cir. 1999). Plaintiff does not explain what other arguments she would have raised to supplement her already ample briefing before the district court.

AFFIRMED.

Footnotes

*This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

CASE NO. C 07-254 SBA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA,
OAKLAND DIVISION

MARILYN LEE,
Plaintiff,

v.

JOHN E. POTTER, UNITED STATES
POSTMASTER GENERAL, Defendant.

September 30, 2008, Decided
October 1, 2008, Filed

JUDGES: Hon. Saundra Brown Armstrong, United States District Court Judge.

OPINION BY: Saundra Brown Armstrong

OPINION

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant's motion for summary judgment. Having read and considered the arguments presented by the parties in the papers submitted to the Court, the Court finds this matter appropriate for resolution without a hearing. The Court finds that plaintiff has failed to produce sufficient evidence to support her claims of discrimination and retaliation and

that defendant is entitled to summary judgment in his favor, for the reasons that follow:

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 ("Title VII") makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. It is also unlawful for an employer to retaliate against an individual because he or she has made a charge of discrimination or opposed a discriminatory practice. 42 U.S.C. § 2000e-3.

Plaintiff Marilyn Lee ("Plaintiff") was a secretary with the US Postal Inspection Service and laterally assigned to a supervisory position in June 2004. Plaintiff found her new job responsibilities stressful and repeatedly requested that she be reassigned back to her original secretarial job. Plaintiff's requests were denied because she was performing well in her new role and her former position had been filled. Unbeknownst to management, plaintiff became increasingly distraught, and ultimately made a statement about hurting herself and leaving behind a note blaming her boss, which caused to her to be placed on administrative leave pending a fitness for duty examination. Plaintiff is now on temporary total disability, having filed a workers' compensation stress claim.

Plaintiff was one of approximately fifty signatories to a petition in February 2003. Plaintiff also participated in an interview regarding that petition in June 2003. Plaintiff contends that defendant retaliated against her

for participating in those activities when it failed to grant her requests for reassignment back to her secretarial position.

Plaintiff cannot maintain claims for fraud, negligent misrepresentation, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of contract, and breach of the covenant of good faith and fair dealing in this case because Title VII is plaintiff's exclusive remedy in the context of claims stemming from alleged employment discrimination by the government. Plaintiff cannot maintain claims for discrimination based on her race (Asian) or disability because she has no direct or circumstantial evidence to support these claims.

Plaintiff's retaliation claim fails for several reasons. First, plaintiff's participation in a petition regarding unfair management practices did not constitute protected activity under Title VII because the petition did not complain of any discriminatory employment practices. Second, the denial of plaintiff's requests for reassignment was not an adverse employment action because the terms and conditions of her employment did not objectively change for the worse. More importantly, plaintiff has little in the way of direct or circumstantial evidence that defendant's decision to deny reassignment was motivated or caused by retaliatory intent. She concludes that it must have been due to retaliation because she can think of no other reason why her requests for reassignment were denied. Lastly, defendant offers legitimate non-retaliatory reasons for its denial of plaintiff's requests and plaintiff cannot show that these reasons are pretextual.

Separately or in the aggregate, the foregoing fatal defects in plaintiff's claims for relief entitle defendant to summary judgment.

II. UNDISPUTED FACTS

Plaintiff commenced employment with the US Postal Service on February 9, 1980 as a Senior Stenographer in the office of the Regional Chief Inspector for the Western Region. (Pl. Dep. 148:13-19). In 1992, plaintiff was assigned to the San Francisco Division of the Postal Inspection Service and became the secretary to the Division's Inspector in Charge ("INC"). (Pl. Dep. 148:20-149:10). She remained in this position during the period relevant to the complaint. *Id.* In June 2004, plaintiff was laterally assigned as the Supervisor of the Administrative Center. (Pl. Dep. 52:2-3, 149:13-22). Shortly thereafter, she began making requests that she be allowed to return to secretarial duties. (Pl. Dep. 74:7-25).

On July 18, 2005, plaintiff was placed on administrative leave after making suicidal statements to management. (Pl. Dep. 149:24-150:1). Her claim of compensable industrial illness due to stress, filed on August 10, 2005, was accepted by the Department of Labor's Office of Workers' Compensation Program (OWCP) on February 4, 2006, and plaintiff is currently on temporary total disability. (Pl. Dep. 150:2-25).

In February 2003, a petition was distributed among employees of the San Francisco Division of the Postal Inspection Service, complaining of the general management style of INC Alan Kiel and his two Assistant Inspectors, Greg Gamache and Juliana Nedd.

(Exh. G to Scharf Dec.). Plaintiff was one of approximately fifty signatories to the petition, which addressed the low morale in the Division. *Id.* The petition requested an independent investigation into working conditions, as well as confidentiality for those who stated in the petition their willingness to speak with someone regarding the concerns raised. *Id.* Subsequently, in June 2003, Inspection Service management conducted an interview of plaintiff regarding issues raised in the petition. (Pl. Dep. 151:25-152:2; Ahern Dep. 37:25-39:11).

Subsequently, several members of management were reassigned. Both Assistants in Charge were given other duties: Nedd was sent to Inspection Service Headquarters in Washington D.C., where she is presently an INC and Gamache was reassigned as performance manager for Western Field Operations, retiring in 2005. (Pl. Dep. 152:7-14). The Inspector in Charge, Alan Kiel, retired on June 30, 2003. (Pl. Dep. 152:15-17). Filling in on an interim basis was John Wisniewski, INC from Philadelphia, who began a detail in San Francisco, initially as Assistant Inspector in Charge, starting in March, 2003 until July 1, 2003, at which time he became Acting INC upon Kiel's retirement. (Pl. Dep. 152:18-153:5). Inspector/Team Leader James Donnelly, Newark Division, was also on detail replacing the reassigned Nedd and Gamache as acting Assistant Inspector in Charge. *Id.*

Kiel's permanent successor was William Atkins, who arrived in San Francisco in September 2003 from the Seattle Division. (Atkins Dep. 13:4-14). Atkins did not have prior involvement with the management of the San Francisco Division and had limited knowledge of

prior events. (Atkins Dep. 21:14-24:13, 26:22-29:3, 31:4-20). Atkins knew that there had been some morale and productivity issues within the division and that a group of employees had signed a petition detailing these issues. (Atkins Dep. 31:4-32:25). During Atkins' first week on the job, in a conversation with plaintiff, who was his secretary, plaintiff advised Atkins of her dissatisfaction working for the prior INC and mentioned that she had signed the petition. (Atkins Dep. 74:24-77:22, 205:8-12). Atkins had no knowledge of plaintiff's subsequent participation in an interview with management regarding the petition until August 2005, when plaintiff disclosed this fact incident to her workers' compensation stress claim. (Atkins Dep. 80:13-81:2; Exh. I to Scharf Dec., pg. 8).

Nine months into Atkins' tenure, during which entire period she was Atkins' secretary, plaintiff accepted a detail into a supervisory position. (Pl. Dep. 45:3-7, 46:6-10). Plaintiff accepted the detail because she wanted supervisory experience in order to build her resume and develop her qualifications for a future promotion. (Pl. Dep. 77:8-78:2). Atkins granted the request, assigning plaintiff to an equal level position in June 2004 as Administrative Support Center supervisor, supervising the Administrative Center's staff of clerical employees. (Exh. I to Scharf Dec., pg. 7-8).

Shortly thereafter, plaintiff requested that she be relieved of her supervisory responsibilities and returned to the secretary position with her immediate supervisor, Sheilah Castor, the division's Executive and Administrative Support ("EAS") Level 21 Administrative Specialist. (Pl. Dep. 74:7-25; Castor Dep. 24:12-25:6). Unaware of plaintiff's deteriorating

health due to the stress, Castor informed plaintiff that management needed her to supervise the administrative center and denied the request. (Castor Dep. 25:10-13). Castor, as the division's Administrative Specialist, was aware of a petition but did not know that plaintiff had signed it. (Castor Dep. 54:2-55:2, 71:11-16, 91:9-11). At this time, Castor was unaware of plaintiff's participation in the June 2003 meeting with management. (Castor Dep. 91:12-21).

Atkins, subsequently consulted by Castor, confirmed that plaintiff was an effective supervisor and credited plaintiff's interpersonal skills for the existence of a more harmonious working atmosphere in the Administrative Center. (Castor Dep. 83:6-10; Exh. H to Scharf Dec.). In his 2004 year-end evaluation of plaintiff, dated November 5, 2004, Atkins complimented her accomplishments as supervisor. (Exh. H to Scharf Dec.). Although the Administrative Center had been plagued with prior morale problems, conflicts and other personnel issues, Atkins noted that plaintiff's interpersonal and supervisory skills had improved the productivity of the center and greatly reduced dissension among the staff. *Id.* He recommended plaintiff for various course work in order to further develop her management and leadership skills. (Pl. Dep. 163:1-4; Exh. H to Scharf Dec.). Atkins sent her to Investigative Analyst training in St. Louis during July 2004, the only San Francisco Division support employee allowed to attend. (Pl. Dep. 163:5-10; Atkins Dep. 125:7-22, 205:19-21; Castor Dep. 84:2-9). In May 2005, as a developmental opportunity, she was sent to Diversity Liaison training. (Atkins Dep. 134:25-135:2, 205:22-24; Castor Dep. 84:14-20). In December 2004, Atkins gave plaintiff a special achievement award and a cash award

only given to a few support employees. (Atkins Dep. 137:12-21, 205:25-206:3; Exh. H to Scharf Dec., pg. 8).

Despite her success in a supervisory role, plaintiff was disenchanted and sought to return as secretary. (Pl. Dep. 139:24-140:3). Atkins was reluctant to allow the return because he believed that her secretarial duties were easily absorbed by other employees and plaintiff had clearly been more effective as a supervisor. (Pl. Dep: 166:21-167:1; Atkins Dep. 46:11-47:2, 49:2-12, 147:15-19). In fact, Atkins explained that while plaintiff had performed well in her position as his secretary, her replacements also performed as well, if not better, than her. (Atkins Dep. 118:4-119:1, 123:11-20). At the same time, she was doing an excellent job in the supervisory position, outperforming her predecessor, [1] and Atkins felt that there was no viable replacement at the time. (Atkins Dep. 46:25-47:2, 49:2-12). Atkins stated that he was unaware of plaintiff's deteriorating mental state. (Atkins Dep. 51:25-52:17). Plaintiff admitted during her deposition that she purposely did not disclose to management her stress because she was trying to remain professional. (Pl. Dep. 68:11-19, 69:9-14, 169:13-15).

Atkins further stated that there were no bid positions among the Inspection Service's clerical staff; thus, plaintiff's previous secretarial assignment was not a bid position to which she was entitled to return. (Atkins Dep. 104:25-105:14, 108:7-17). The Inspection Service support positions are filled by EAS non-bargaining unit employees. *Id.* As a result, reassignments within the Inspection Service are routine, as EAS employees are subject to periodic reassignments as necessitated by the changing needs of the Division. *Id.* Under the

Postal Employee and Labor Relations Manual (ELM), Section 353.21, "Authorized management officials may reassign non-bargaining employees without following regular competitive procedures." (Pl. Dep. 171:1-12). Plaintiff was an EAS Level 14 employee who had been laterally reassigned to the supervisory position. (Atkins Dep. 206:22-207:12).

On July 13, 2005, plaintiff had a conversation with Acting Assistant Inspector in Charge, Sally Diaz, at which time plaintiff expressed her unhappiness with her current assignment and management's decision not to allow her to return to her secretarial duties. (Pl. Dep. 174:4-15). Plaintiff herself recalls stating: "What do I have to do, do I have to hurt myself to make it clear that I have to be removed from the supervisory position?" (Pl. Dep. 174:21-24). Plaintiff attributes this outburst to her frustration with management. (Pl. Dep. 175:23-176:4). Although Diaz initially offered to withhold reporting these comments to management, because of plaintiff's distraught behavior, Diaz advised INC Atkins of the comments the following day. (Exh. K to Scharf Dec., pg. 3-6). Diaz visited plaintiff at her home on July 16, 2005, concerned for plaintiff's welfare. *Id.* In a phone conversation on the same date, Diaz advised plaintiff that she had notified management about plaintiff's statement. *Id.*

As a result of plaintiff's statements, on July 18, 2005, plaintiff was placed on paid administrative leave by management. (Pl. Dep. 183:7-10). Management gave plaintiff a letter that referred to recent precipitating events and stated that plaintiff's allegations regarding a stressful work environment would be reviewed. (Pl. Dep. 183:14-21). At the time, plaintiff was also provided

information on the Employee Assistance Program, in which plaintiff failed to participate. (Pl. Dep:183:22-184:1). Management then informed plaintiff that she would be scheduled for a fitness for duty examination. (Pl. Dep. 184:7-16). On August 10, 2005, plaintiff filed a workers' compensation claim for "work related stress & hostile work environment." (Pl. Dep. 184:17-19). On August 16, 2005, INC Atkins sent plaintiff a letter informing her that based on recent events, management had become concerned about her psychological distress; as a result, she would be given a fitness for duty exam to determine whether she would be able to continue in her current assignment. (Atkins Dep. 90:23-91:6).

On September 8, 2005, Dr. Carroll Brodsky conducted the fitness for duty exam. (Exh. L to Scharf Dec.). Brodsky diagnosed Lee with Adjustment Disorder with Depression. *Id.* at pg. 22. He reported that plaintiff was almost ready to return to secretarial duties at work, and restricted her from supervising others, as well as recommending that she not report to a supervisor she believed treated her unfairly. *Id.* at pg. 22-23. In October 2005, plaintiff requested to return to work and to be reassigned out of her supervisory position. (Pl. Dep. 188:2-189:5). Plaintiff requested a detail (non-permanent assignment to another agency) to the Office of Inspector General ("OIG"); however, the detail was eventually cancelled due to the OIG's unwillingness to assume plaintiff's salary during the detail. (Pl. Dep. 59:24-60:1, 189:13-190:1; Atkins Dep. 63:11-16).

Plaintiff's Office of Workers' Compensation Program (OWCP) claim, which had been filed in August 2005, was approved by the Department of Labor in February

2006. (Pl. Dep. 150:2-9). As a result of that claim, plaintiff went on temporary total disability and currently remains in that status, earning more in monthly pay from her workers' compensation payments than her previous salary while working. (Pl. Dep. 98:1-99:1; 150:14-16).

III. LEGAL STANDARD

A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. *Celotex v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). An issue is "material" if the fact may affect the outcome of the case. *Id.* at 249. "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). The party moving for summary judgment has no burden to produce any evidence on elements of a claim on which the non-moving party will bear the burden of trial, but can merely point out an absence of evidence to support any such element. *Celotex*, 477 U.S. at 322-23; *Maffei v. Northern Ins. Co. of New York*, 12 F.3d 892,

899 (9th Cir. 1993). Once the moving party points out the absence of evidence, then the non-moving party must come forward with specific evidence to show there is a genuine issue for trial. *Celotex*, 477 U.S. at 322-23; *Maffei*, 12 F.3d at 899. The moving party is entitled to judgment as a matter of law if the non-moving party fails to make this showing. *Celotex*, 477 U.S. at 323.

Summary judgment is not only proper if plaintiff fails to produce *any* evidence on an element of her case, but summary judgment is also proper if plaintiff fails to produce *sufficient* evidence on an element of her case. The Supreme Court has specifically held that summary judgment is proper against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The mere existence of a "scintilla" of evidence in support of the non-moving party's position is not sufficient. The non-moving party has the burden of establishing sufficient evidence on each element of his case so that the finder of fact could return a verdict for her. *Anderson*, 477 U.S. at 249.

IV. ANALYSIS

A. Title VII is Plaintiff's Exclusive Remedy

In the context of claims stemming from alleged employment discrimination by the federal government, Title VII expressly limits plaintiff's remedies to those enumerated in the statute. *Brown v. General Services Administration*, 425 U.S. 820, 835, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976). Where a federal employee asserts a claim under Title VII, that statute is exclusive of any

other remedy against not only the federal government, but also against individual federal employees alleged to have participated in the discrimination. *White v. General Services Administration*, 652 F.2d 913, 916-17 (9th Cir. 1981). Because the purpose of Title VII was to create "an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination," plaintiff may not "bootstrap" additional causes of action onto her Title VII complaint. *Brown v. General Services Administration*, 425 U.S. at 829.

As Ms. Lee's complaint is based upon alleged employment actions taken against her by employees of the Postal Inspection Service, actions Ms. Lee alleges were taken in retaliation for her alleged participation in protected activity, Title VII is the exclusive remedy available to her. Accordingly, she cannot bring her claims of fraud, negligent misrepresentation, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of contract, and breach of the covenant of good faith and fair dealing in this context.

B. Plaintiff Lacks Evidence to Support Claims of Race and Disability Discrimination

Plaintiff has the burden of establishing a *prima facie* case of discrimination by a preponderance of the evidence. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). To establish a *prima facie* case of race discrimination, Plaintiff must plead and prove that: (1) she belongs to a protected class; (2) she performed his job satisfactorily; (3) she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated

non-protected class employees. *McDonnell Douglas Corp.*, 411 U.S. at 802-03 (summary judgment upheld where plaintiff introduced no admissible evidence that other employees were treated differently than he); *Fong v. American Airlines, Inc.*, 626 F.2d 759, 762 (9th Cir. 1980) (same). Plaintiff must prove all of these essential elements.

During her deposition, plaintiff admitted that the gravamen of her claim was for retaliation stemming from her signing the petition and participating in a subsequent interview with management regarding the petition. (Pl. Dep. 18:22-25, 95:19-96:12). She admitted that she has no evidence that she was discriminated against for any other reasons, such as her race or disability. (Pl. Dep. 95:19-96:12). In fact, plaintiff's attorney stipulated that the disability portion of her complaint should be dismissed. (Pl. Dep. 95:14-16). Accordingly, plaintiff has no evidence to support her claims of race and disability discrimination; therefore, defendant is entitled to summary judgment on these claims.

C. Plaintiff Cannot Establish a *Prima Facie* Case of Retaliation

Title VII prohibits retaliation against an individual for opposing any practice made unlawful by Title VII of the Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act, the Rehabilitation Act, or for participating in any stage of administrative or judicial proceedings under these statutes. 29 C.F.R. § 1614.101(b). To establish a *prima facie* claim of retaliation, plaintiff must show that: (1) plaintiff engaged in protected activity; (2) the employer

subjected her to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000).

1. Plaintiff Did Not Engage in Protected Activity

To establish the first element of a *prima facie* case -- participation in a protected activity, plaintiff must establish a reasonable belief that the employment practice she protested was prohibited under Title VII. *See Trent v. Valley Electric Association, Inc.*, 41 F.3d 524, 526 (9th Cir. 1994). An employee must show one of two types of protected activity to support a retaliation claim. The protected activity can be the "employee's opposition to conduct made an unlawful employment practice" under Title VII, or it can be the "employee's participation in the machinery set up by Title VII to enforce its provisions." *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997), quoting *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1981). Accordingly, activities such as contacting an EEO counselor or being a witness in another employee's EEO case are protected.

In this case, plaintiff did not establish a reasonable belief that she opposed any unlawful employment practices protected by Title VII. The facts demonstrate that plaintiff engaged in activity to protest *unfair* employment practices, not *discriminatory* employment practices. The petition that Lee signed did not specifically allege discrimination prohibited under Title VII; instead, its primary concern was the negative morale within the division because of poor management policies and decisions. *See* (Exh. G to Scharf Dec.). The signatories of the petition were concerned about

"management decisions based on personal agendas and biases, rather than the best interests of the Division and its employees"; however, the petition does not mention any concerns related to discriminatory employment practices or treatment. Moreover, plaintiff did not state anywhere in her deposition that she signed the petition to oppose *discriminatory* employment practices. Consequently, plaintiff cannot show a reasonable belief that she was protesting behavior prohibited under Title VII.

Other signatories to the petition also signed the petition because they wanted to protest *unfair* employment practices, not *discriminatory* employment practices. Kathleen O'Leary, one of plaintiff's co-workers, stated that she signed the petition because she felt that employees should not be treated differently because they had a better relationship with the boss. (O'Leary Dep. 85:4-12). She signed the petition because she felt there was unjust favoritism in the workplace, not because of concerns about discrimination. (O'Leary Dep 40:5-41:1, 85:4-12). Furthermore, management did not view the petition as complaining about discrimination; rather, they felt that employees were complaining about favoritism and poor management practices. (Ahern Dep. 80:13-20, 82:3-22). More importantly, the evidence demonstrates that plaintiff believed that the petition was not related to discriminatory employment practices. (Pl. Dep. 151:2-24). For example, in plaintiff's June 2003 statement to management regarding the petition, there is no mention of any form of discrimination. *See* (Exh. M. to Scharf Dec.). In fact, plaintiff states that she signed the petition *strictly* because of her concerns about favoritism by management. *Id.* (emphasis added). *See*

Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1411 (9th Cir. 1987) (complaining about company policies for personal reasons is not protected activity under Title VII). Thus, as the facts demonstrate, the petition was created to protest unfair and poor decisions by management -- not *discriminatory* employment practices. Plaintiff cannot reasonably demonstrate that complaining about mismanagement and waste is the same as opposing *discriminatory* employment practices prohibited under Title VII; accordingly, plaintiff's participation in the petition is not a protected activity under Title VII.

Plaintiff's participation in the petition and subsequent interview is also not a protected activity because she did not participate in the machinery set up by Title VII to enforce its provisions. Plaintiff never filed an official EEO complaint and plaintiff's June 2003 interview with management regarding the petition did not involve any EEO counselors. Because plaintiff can show no protected activity prior to her termination, her retaliation claim fails, and summary judgment is granted on that claim.

2. The Denial of Plaintiff's Requests For Reassignment Was Not an Adverse Employment Action

Even if plaintiff's decision to sign the petition and participate in an interview could be viewed as protected activity, which it was not, the denial of plaintiff's requests for reassignment was not an adverse employment action. The United States Supreme Court has held that the anti-retaliation provision of Title VII only covers "employer actions that would have been

materially adverse to a reasonable employee." *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006). The action "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* "Among those employment decisions that constitute an adverse employment action are termination, dissemination of a negative employment reference, issuance of an undeserved negative performance review and refusal to consider a promotion." *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000). "By contrast . . . declining to hold a job open for an employee and badmouthing an employee outside the job reference context do not constitute adverse employment actions." *Id.*

In this case, the denial of Lee's request for reassignment did not constitute an adverse employment action under the test articulated by the Court in *White*. First, the supervisory duties that Atkins assigned to Lee were actually more desirable than the duties Lee held as a secretary. Plaintiff even admitted that the supervisory duties associated with the supervisor position provided her with a favorable opportunity to develop her resume and management skills. (Pl. Dep. 77:12-78:2). In fact, plaintiff accepted the job precisely because of the developmental opportunities that the position provided. *Id.* Moreover, Marilyn's pay grade (Level 14) was already at a supervisory level. (Atkins Dep. 206:22-207:12) As a result, Lee was *laterally* assigned and not demoted to her new position. *Id.*

Plaintiff argues that because management knew that

the supervisor position was causing her stress, their denial of her requests for reassignment constitutes an adverse employment action. (Pl. Dep. 66:5-67:11). However, plaintiff admitted that she remained professional during her entire stint as supervisor and did not allow management to witness the stress that she was experiencing. (Pl. Dep. 68:11-19, 69:9-14). Furthermore, plaintiff never directly complained to Atkins about a hostile work environment or stress. (Atkins Dep. 128:21-24, 174:11-14). As a result, Atkins did not know plaintiff was experiencing emotional difficulties because of her new position. (Atkins Dep. 124:20-125:2, 187:22-188:6, 192:4-193:4, 207:18-24). In addition, none of plaintiff's co-workers and immediate supervisors ever reported to Atkins that plaintiff was experiencing stress. (Atkins Dep. 50:12-16, 66:9-11, 111:13-15). Consequently, Atkins had no way of knowing that the denial of plaintiff's requests for reassignment was causing plaintiff stress.

More importantly, within the Inspection Service, employees are routinely reassigned according to the needs of the division and plaintiff was aware of this fact. (Pl. Dep. 170:20-35; Atkins Dep. 104:25-105:21, 108:7-17). As a result, plaintiff's reassignment and defendant's eventual decision to deny her requests were well within the standard operating procedures of the Postal Inspection Service. Plaintiff was not being treated differently than any other employee within the Inspection Service. As the terms and conditions of plaintiff's employment did not objectively change for the worse as a result of her lateral transfer or defendant's denial of her requests, it was not an adverse employment action as a matter of law. *Nidds v. Schindler Elevator*, 103 F.3d 854, 860 n.3 (9th Cir. 1996)

(transfer to different work site with no reduction in pay not an adverse job action); *Kortan v. Cal. Youth Authority*, 217 F.3d 1104, 1112 (9th Cir. 2000) (reassignment of job duties, falsely accusing employee of not submitting work order, ridiculing of employee to co-workers, and unfairly negative performance review are insufficient to establish adverse employment action); *Tran v. Trustees of State Colleges in Col.*, 355 F.3d 1263, 1268 (10th Cir. 2004) (transfer without reduction in pay or benefits that requires employee to develop new skills is not adverse employment action). Thus, the denial of plaintiff's requests for reassignment cannot support her retaliation claim and summary judgment is granted on that claim.

3. No Causal Link Exists Between the Protected Activity and the Adverse Action

Even assuming that the denial of plaintiff's requests for reassignment was an adverse employment action, which it was not, plaintiff cannot establish a causal connection between plaintiff's participation in the petition and management's decision to keep her as a supervisor. This is true for no less than five separate reasons: First, there was not a close temporal relationship between these events. *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (temporal proximity between protected activity and adverse employment action must be "very close" to make a *prima facie* case of retaliation; 3 months is not sufficient). Plaintiff signed the petition in February 2003 and participated in a follow-up interview with management regarding the petition in June 2003. During Atkins' first week on the job in September 2003, plaintiff disclosed to him that

she had signed the petition, but Atkins had no knowledge of plaintiff's subsequent June 2003 meeting with management regarding the petition. (Atkins Dep. 74:24-77:5, 80:13-81:2, 205:8-12, Exh. I to Scharf Dec., pg. 8). Lee was not transferred to the supervisor position until June 2004 and plaintiff did not make any requests for reassignment until shortly thereafter. (Pl. Dep. 74:7-25, 158:18-159:22; Castor Dep. 24:12-25). Between September 2003 and June 2004, Atkins only discussed the petition once and that was with plaintiff, who brought the petition up entirely of her own accord during Atkins' first week on the job. (Atkins Dep. 74:24-75:7). Over a year and a half elapsed between plaintiff's participation in the petition and management's denial of her first request for reassignment. Accordingly, plaintiff cannot establish a close temporal relationship between the two events.

Second, management had limited knowledge of the events surrounding the petition and only knew that plaintiff had engaged in the allegedly protected activity because she disclosed this information. (Atkins Dep. 26:22-28:25, 74:24-75:15, 77:13-22). Even when Atkins learned about the petition, he did not know the specific details regarding the petition; Atkins only knew that the petition complained about bad employee morale, bad productivity, and inefficient management practices. *Id.* More importantly, Atkins was unaware that plaintiff had participated in a subsequent meeting with management regarding the petition. (Atkins Dep. 80:25-81:3). As a result, Atkins was only vaguely aware of a petition and plaintiff's participation in it. (Exh. J to Scharf Dec., pg. 1).

Third, Atkins had no motive to retaliate against

plaintiff. Atkins received his position as Inspector in Charge ("INC") because the previous manager retired. (O'Leary Dep. 72:8-73:2). Although Atkins did not know any specific details regarding the petition, he understood that concerns raised in it played a role in the prior managers leaving San Francisco. (Atkins Dep. 76:13-21). As Atkins stated himself, "I was not affected by the petition in any way, except in a positive way, as I was chosen to become the Inspector in Charge in San Francisco." (Exh J. To Scharf Dec., pg. 2). Consequently, Atkins had absolutely no reason to retaliate against an employee who signed a petition that directly benefitted him.

Fourth, plaintiff was given a significant cash award and provided other leadership opportunities while working as a supervisor, which is inconsistent with a claim that management was retaliating against her. [2] In December 2004, Atkins awarded Lee with one of the highest division merit awards, a honor that few support employees receive. (Pl. Dep. 136:21-138:4, 165:1-16). As a result of that award, Lee received a thousand dollars of merit pay. *Id.* Atkins also consistently praised Lee with special achievement awards and was complimentary in his evaluation of her work. (Atkins Dep. 205:25-206:3). For example, in a November 2004 evaluation, Atkins wrote: "Marilyn has proved she can address significant problem areas and come up with equitable solutions. The morale of the admin staff, their ability to work as a team, and their subsequent improvement in productivity are directly attributable to Marilyn's interpersonal and supervisory abilities." (Exh. H to Scharf Dec.).

In addition to awarding the plaintiff with cash rewards,

Atkins also recommended Lee for various course work in order to further develop her management and leadership qualities. He sent Lee to Investigative Analyst training in St. Louis during July 2004, the only San Francisco Division support employee allowed to attend. (Atkins Dep. 125:7-22, 205:13-24; Castor Dep. 84:2-9). In May 2005, Atkins provided Lee with another developmental opportunity when he sent her to Diversity Liaison training. (Pl. Dep. 163:24-164:2; Atkins Dep. 134:25-135:2, 205:22-24; Castor Dep. 84:14-20). As plaintiff's former co-worker Kaycee Graham testified, the training opportunities offered to Lee were viewed as positive experiences and coveted within the division because they could bolster an employee's resume. (Graham Dep. 76:11-77:12).

Fifth, plaintiff has presented no evidence that any of the other signatories were retaliated against. Plaintiff testified that, to her knowledge, she was the *only* signatory to the petition and *only* person who participated in a follow-up meeting regarding the petition that was the victim of retaliation. (Pl. Dep. 126:2-5, 143:21-25).

As the evidence demonstrates, plaintiff cannot establish a causal link between her alleged protected activity and defendant's decision to deny reassignment. *See Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir. 2003) (summary judgment is appropriate if the totality of facts fail to establish the requisite causal link). Accordingly, plaintiff cannot maintain her retaliation claim and summary judgment is granted on that claim.

E. Defendant's Reasons For Denying Plaintiff's Request for Reassignment Were Legitimate and

Non-Retaliatory

Even if plaintiff could prove a *prima facie* case of retaliation, which she cannot, she cannot refute defendant's legitimate and non-discriminatory reasons for refusing to grant plaintiff's request for reassignment. *Vasquez v. Los Angeles*, 349 F.3d 634, 647 (9th Cir. 2004) (granting summary judgment on retaliation claim because employer proferred legitimate reason for plaintiff's transfer that plaintiff failed to show was pretextual). Specifically, plaintiff was performing well in her new position and her previous position had been filled. (Atkins Dep. 93:8-11, 144:22-145:1; Castor Dep. 90:21-91:8). Executive and Administrative Support ("EAS") employees can be moved at the manager's discretion according to the needs of management and the division. (Atkins Dep. 108:11-17). Management kept Lee in a supervisory role because of her superior performance and excellent management skills. *See* (Exh. H to Scharf Dec.). She had improved morale, improved effectiveness, and increased efficiency within the division. (Atkins Dep. 72:25-73:5, 122:11-14; Castor Dep. 91:22-94:9). Moreover, management felt that she was handling the supervisory responsibilities well and improving work procedures within the division. (Atkins Dep. 180:15-181:23; Castor. Dep. 93:16-94:9, 100:17-20). In her deposition, plaintiff agreed with management's positive appraisal of her performance, stating that she had outperformed her predecessor at the supervisor position. (Pl. Dep. 84:2-7, 169:7-11).

Management also kept Lee in the supervisor position because the division needed her in that role. (Atkins Dep. 122:11-14, 147:15-19; Castor Dep. 25:10-13, 31:17-

24, 32:11-16). It was critical to the division that Marilyn Lee remain as the administrative center supervisor. (Atkins Dep. 147:15-19). As Atkins stated in his November 2004 evaluation of Lee, she had "proven herself to be *indispensable* to the organization in this role [as supervisor] . . . the additional responsibility and scope of her new assignment really pinpointed Marilyn's strengths." (Exh. H to Scharf Dec.) (emphasis added).

Moreover, management knew that if Lee were removed, the supervisor position would be difficult to staff. "It's easy to fill a secretary job; it's not easy to fill a supervisor job." (Atkins Dep. 144:24-145:1). "I could get anybody to do the secretary job. I couldn't get just anybody to do the supervisor job." (Castor Dep. 106:12-14). Lastly, plaintiff's previous secretary position had already filled by a qualified individual, Kaycee Graham; consequently, there was no need to transfer Lee back into that position. (Atkins Dep. 118:4-119:1; Graham Dep. 77:23-78:9).

Thus, the agency clearly had legitimate and non-retaliatory reasons to keep plaintiff in her supervisory role, so her claim of retaliation fails. *See, e.g, Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1437-38 (9th Cir. 1990) (not promoting plaintiff because she did not maintain a positive workplace demeanor and did not command the necessary respect was a legitimate non-discriminatory reason).

F. Plaintiff Cannot Prove Pretext

Where, as here, the defendant articulates legitimate and non-retaliatory reason for the adverse employment

action, the burden shifts back to the plaintiff to prove with *direct* or *specific* and *substantial* circumstantial evidence "that the explanation was merely a pretext for impermissible retaliation." *Manatt v. Bank of America*, 339 F.3d 792, 800-01 (9th Cir. 2003) (Because "Manatt failed to introduce any direct or specific and substantial circumstantial evidence of pretext, summary judgment for the Bank must be affirmed."). Plaintiff has not met that burden in this case.

Plaintiff has no direct evidence that Atkins kept her in the supervisor position for reasons unrelated to her excellent performance in that role. Plaintiff stated in her deposition that she believes that management's decision was retaliation because she can think of no other reason why Atkins did not honor her request for reassignment. (Pl. Dep. 48:11-49:14, 167:2-18, 167:24-168:3). However, she cites no evidence to support her claim. *Id.* She merely states her subjective belief that management must have been retaliating against her for her participation in the petition. (Pl. Dep. 65:3-16). *See e.g., Schuler v. Chronicle Broad. Co. Inc.*, 793 F.2d 1010, 1011 (9th Cir. 1986) (employee's feelings or subjective beliefs do not qualify as specific and substantial evidence of pretext); *Steckl v. Motorola, Inc.*, 703 F2d 392, 393 (9th Cir. 1983) (plaintiff's "mere assertions that [defendant] had discriminatory motivation and intent in failing to promote him were inadequate, without substantial factual evidence, to raise an issue precluding summary judgment.").

Plaintiff attempts to cite the cancellation of her detail to the Office of Inspector General ("OIG") as circumstantial evidence of reprisal. (Pl. Dep. 59:19-60:23). However, the evidence shows that management

was unable to detail Lee because of a salary dispute. (Atkins Dep. 63:11-16, 167:1-24; Exh. J to Scharf Dec., pg. 2). In fact, Atkins initially approved Lee's detail to OIG because he felt that it would be a positive developmental opportunity for plaintiff. (Atkins Dep. 62:16-19, 165:4-8; Exh. J to Scharf Dec., pg. 2). Unfortunately, OIG's Special Inspector in Charge, Anita Davidson, was unwilling to assume Ms. Lee's salary because OIG was not authorized a support position in San Francisco. (Exh. J to Scharf Dec., pg. 2). There is absolutely no way that Inspector Davidson's decision was motivated by a retaliatory purpose because Ms. Davidson had no knowledge of plaintiff's participation in the petition and any subsequent meetings regarding the petition. (Atkins Dep. 208:17-209:2).

Plaintiff argues that because there were other employees within the division who might have been able to assume her supervisor position had she been detailed to OIG, management must have denied her detail in retaliation for her petition activity. (Pl. Dep. 61:12-62:16). However, as Atkins explained in his deposition, these employees were ill-suited for the supervisor position. (Atkins Dep. 68:7-71:6). With the exception of this tenuous circumstantial evidence and plaintiff's own subjective belief that management's decision was motivated by retaliatory motives, plaintiff offers no direct evidence to dispute the fact that the cancellation resulted from OIG's unwillingness to pick up her salary. (Pl. Dep. 60:13-23).

Furthermore, there were additional legitimate and non-retaliatory reasons to explain the denial of plaintiff's transfer to OIG. The Postal Inspection Service and OIG

had a strained political relationship and a rift existed between the two agencies. (Atkins Dep. 168:18-169:8; O'Leary Dep. 53:11-14). As a result, it was difficult for the Inspection Service and OIG to work out an agreement where OIG would assume plaintiff's salary. Plaintiff offers no direct or circumstantial evidence to dispute this additional explanation.

Lastly, plaintiff argues that defendant's treatment of her while placing her on administrative leave is evidence of pretext and retaliation. (Pl. Dep. 90:12-92:3). However, management was merely following the standard operating procedures of the Postal Inspection Service for an employee who makes suicidal statements, when it placed plaintiff on leave. (Atkins Dep. 90:23-92:9, 172:14-21). The administrative letter that management sent to her was a standard human resource generated letter. (Castor Dep. 95:19-97:9; Exh. N to Scharf Dec.). As Atkins stated in his deposition, the scheduling of a medical appointment and subsequent decision to lock plaintiff's computer followed the standard operating procedures of the Postal Inspection Service and plaintiff was not treated differently. (Atkins 178:21-179:11). Plaintiff's only rebuttal to this evidence is her subjective opinion that her fitness for duty examination should have been scheduled earlier, but she offers no direct evidence to dispute defendant's explanation. (Pl. Dep. 91:18-91:3).

As the evidence indicates, plaintiff has no direct or specific and substantial circumstantial evidence of pretext; accordingly, defendant is entitled to summary judgment on her retaliation claim.

V. CONCLUSION

Therefore, good cause appearing, and for the reasons stated above, and for the reasons stated in defendant's moving papers, the Court hereby grants defendant's motion for summary judgment on all of plaintiff's claims, and hereby dismisses this action in its entirety with prejudice.

Dated: September 30, 2008

/s/ Saundra Brown Armstrong

Hon. Saundra Brown Armstrong

United States District Court Judge

Footnotes

1 Plaintiff testified during her deposition that she outperformed her predecessor. (Pl. Dep. 84:2-7, 169:7-11).

2 Where the same actor is responsible for both favorable and adverse employment actions within a short period of time, a strong inference arises that there was no discriminatory motive. *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996).

11/09/2009
No. 08-17328
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARILYN LEE,
Plaintiff - Appellant,
v.
JOHN E. POTTER, United States Postmaster General,
Defendant - Appellee.

ORDER

This case shall be submitted on the briefs and record, without oral argument, on December 8, 2009, in San Francisco, California, pursuant to Federal Rule of Appellate Procedure 34(a)(2).

FOR THE COURT
MOLLY C. DWYER
CLERK OF COURT

By: Beverly Brown
Deputy Clerk

2/1/2010
No. 08-17328
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARILYN LEE,
Plaintiff - Appellant,
v.
JOHN E. POTTER, United States Postmaster General,
Defendant - Appellee.

ORDER

Before: TASHIMA, GRABER, and BYBEE, Circuit Judges.

The petition for panel rehearing is DENIED.

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the tight of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV, Section 1:

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Section 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343(a)(3) & (4):

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

...

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all

persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Civil Rights Act–42 U.S.C. § 1983:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

42 U.S.C. §§ 2000e-2(a) and (b) and 3:

2. UNLAWFUL EMPLOYMENT PRACTICES

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for

employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

3. OTHER UNLAWFUL EMPLOYMENT PRACTICES.
(a) It shall be an unlawful practice for an employer to discriminate against of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Fed. R. Civ. P. 56(c) and (e)(2):

(c). Serving the Motion; Proceedings.
....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
....

(e)(2). Affidavits; Further Testimony.
....*Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule----set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.